No. 11982

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

CENTRAL MANUFACTURERS' MUTUAL INSURANCE COMPANY, and INDIANA LUMBERMEN'S MUTUAL INSURANCE COMPANY,

Appellants,

vs.

JIM DANDY MARKETS, INC., a Corporation; FIREMAN'S FUND INSURANCE COMPANY, a Corporation; and E. F. SMITH,

Appellees.

APPELLANTS' BRIEF.

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APPELLANTS' BRIEF.

Jurisdiction.

In compliance with Rule 20 (C. C. A. 9, Subsection 2b) appellants state that the statutory provisions believed to sustain the jurisdiction of the District Court to render judgment in this case and of this Court upon appeal to review the judgment are as follows:

United States Code Annotated, Title 28, Section 400 (Judicial Code 274d): DECLARATORY JUDGMENTS AUTHORIZED:

> *Procedure:* (1) In cases of actual controversy (except with respect to Federal taxes) the courts of

the United States shall have power upon petition, declaration, complaint, or other appropriate pleadings to declare rights and other legal relations of any interested party petitioning for such declaration, whether or not further relief is or could be prayed, and such declaration shall have the force and effect of a final judgment or decree and be reviewable as such."

United States Code Annotated, Title 28, Section 41 (Judicial Code, Sec. 24, Amended): ORIGINAL JURISDICTION.

The district courts shall have original jurisdiction as follows:

1. UNITED STATES AS PLAINTIFF: CIVIL SUITS AT COMMON LAW OR IN EQUITY. *First.* "* * * or, where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of $3,000.00, and (a) arises under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, or (b) is between citizens of different States * * *."

United States Code Annotated, Title 28, Section 225 (Judicial Code, Sec. 128): APPELLATE JURISDICTION.

(a) *Review of final decisions.* "The circuit courts of appeal shall have appellate jurisdiction to review by appeal final decisions—*First:* In the district courts, in all cases save where a direct review of the decision may be had in the Supreme Court under Section 345 of this title."

It was alleged in the complaint [R. p. 4] and the District Court found, that there is a diversity of citizenship between plaintiffs and all of the defendants, and that the amount in controversy exceeds the sum of $3,000.00, exclusive of interest and costs of suit. [R. pp. 108, 109.]

Statement of the Case.

The Central Manufacturers' Mutual Insurance Company, a Corporation, and Indiana Lumbermen's Mutual Insurance Company, a Corporation, brought this action for declaratory relief against defendants Jim Dandy Markets, Inc., a Corporation; Fireman's Fund Insurance Company, a Corporation, and E. F. Smith, seeking a declaration of the respective rights, duties and liabilities of the plaintiffs and defendant, Fireman's Fund Insurance Company, under policies of fire insurance respectively issued by them, and for a determination by the Court as to the insurable interests in the premises and the proceeds of the policies as between defendant, Jim Dandy Markets, Inc., and defendant, E. F. Smith. [R. p. 9.]

Defendant, E. F. Smith, in addition to his answer to the complaint, filed a cross-complaint against defendant, Jim Dandy Markets, Inc., seeking the reformation of an assignment of a lease of the premises upon which the building covered by said fire insurance policies was located. [R. p. 43.]

The defendant Jim Dandy Markets, Inc., in addition to answering plaintiffs' complaint, filed its cross-claim against defendant E. F. Smith, praying that the rights of Jim Dandy Markets, Inc., and defendant E. F. Smith to the proceeds of any amounts recovered against defendant Fireman's Fund Insurance Company be fixed, determined and adjudicated. [R. p. 97.]

On July 1, 1945, defendant E. F. Smith entered into an agreement with Charles Schuster, Leo A. Goldberg, Earl I. Swetow, Max M. Berick and Norman Schuster, a co-partnership, doing business under the name and style of

Jim Dandy Markets, as to eight stores, including one known as the "Atlantic Store," for the sale and purchase of salable merchandise in each of said stores; the leasing of all store fixtures and equipment; the leasing or subleasing of the stores; and the sale and purchase of specified trucks and trailers. The partnership was subsequently incorporated and succeeded to by defendant Jim Dandy Markets, Inc. [R. p. 27.]

Jim Dandy Markets, Inc., entered into possession of said stores pursuant to said agreement and continued to occupy said property under this and a subsequent agreement of June 12, 1946, and was so occupying it at the time the premises known as the "Atlantic Store" were damaged by fire on January 14, 1947.

On June 12, 1946, defendants E. F. Smith and Jim Dandy Markets, Inc., entered into a supplementary and modified agreement, modifying the terms of the agreement of July 1, 1945, providing for the sale of all of the fixtures, machinery and equipment located and contained in all of the markets referred to in the agreement of July 1, 1945, and providing for the deposit in escrow of Bills of Sale of the fixtures, machinery and equipment located in the various markets; for the deposit in said escrow of the leases of named markets, including the "Atlantic Boulevard Market," together with a written assignment of each of the said leases; for the holding of said documents in said escrow until the full purchase price of the respective stores had been paid into said escrow, after which the Bill of Sale, together with the lease and assignment thereof of the respective markets were to be delivered to said Jim Dandy Markets, Inc., for cancellation as of the 1st day of July, 1946, of the lease on said fixtures, machinery

and equipment; for the cancellation and termination of the sub-leases of the various markets including the "Atlantic Boulevard Store" as of the date of delivery from escrow of the leases and assignments thereof. [R. p. 65.]

On July 19, 1945, the plaintiff Central Manufacturers' Mutual Insurance Company issued its standard California fire insurance policy whereby it insured the Jim Dandy Markets, Inc., against all loss or damage by fire in the amount of $12,500 on the "Atlantic Boulevard Market" for the period from the 19th day of July, 1946, at noon, to the 19th day of July, 1949. [R. pp. 109 and 314.]

On July 19, 1945, plaintiff Indiana Lumbermen's Mutual Insurance Company issued its standard California fire insurance policy whereby, for the period from the 19th day of July, 1946, at noon, to the 19th day of July, 1949, it insured Jim Dandy Markets, Inc., against all loss or damage by fire to an amount not exceeding $12,-500, the premises described as One Story Composition Roof, D Class building at 6801 Atlantic Boulevard in the City of Bell, County of Los Angeles, State of California, including foundations, sidewalks, plumbing, electrical wiring and stationary heating and lighting apparatus and fixtures; also all permanent fixtures, awnings, wall and ceiling decorations and frescoes, stationary scales, machinery and elevators belonging to and constituting a part of said building (known and referred to throughout the trial as the "Atlantic Boulevard Market," and constituting one of the properties referred to in the various agreements between defendants Jim Dandy Markets and E. F. Smith.) [R. pp. 110 and 314.]

On the 5th day of July, 1945, defendant Fireman's Fund Insurance Company, issued its standard California

fire insurance policy insuring for three years defendant E. F. Smith against loss by fire of said building, known as the "Atlantic Store" in the amount of $16,700. [R. pp. 113 and 314.]

On January 14, 1947, the "Atlantic Store" was damaged by fire in the amount of $32,476.92, as determined by an Adjuster's Agreement entered into under date of April 9, 1947. [R. p. 193.]

As counsel for plaintiffs and cross-appellants Central Manufacturers' Mutual Insurance Company and Indiana Lumbermen's Mutual Insurance Company understand the state of the record, no question is raised on the following matters:

(a) That all payments which were due E. F. Smith at the date of the fire under the original or supplemental agreements were paid. [R. pp. 159 and 167.]

(b) That at the date of the fire, January 14, 1947, the various documents deposited in escrow had not been delivered, but remained in escrow. [R. p. 148.]

(c) That the premiums on the three policies of fire insurance companies hereinbefore referred to had been paid and the policies had not been cancelled. [R. pp. 154, 155 and 255.]

(d) That final payment by defendant Jim Dandy Markets, Inc., to the escrow under the agreement with defendant E. F. Smith, and delivery of the documents by Morrison Escrow Company, the escrow holder, occurred on or about March 19, 1947. [R. p. 164.]

(e) That defendant Jim Dandy Markets, Inc., succeeded to all of the rights of the partnership in Jim Dandy Markets, Inc., a Corporation. [R. p. 114.]

(f) That defendant E. F. Smith was the lessee of the property known as the "Atlantic Boulevard Store" under a lease dated September 29, 1941, executed by Charles E. Kindig and Daisy Kindig for a term of five years beginning August 1, 1942, until August 1, 1947. On February 1, 1942, defendant E. F. Smith entered into another lease for the same period with Thomas A. McLenaghan, as Administrator of the estate of E. T. Williams, deceased, an owner of a part interest in said building. [R. p. 111.]

By the provisions of the lease of September 29, 1941, it was provided:

FIFTH: "It is understood that the improvements now on the premises are the property of the Lessee, and it is agreed by the Lessor that these and all other improvements placed on the said property during the term of this lease by the Lessee shall belong to the Lessee and may be removed by him at the expiration of the said term." [R. p. 58.]

The "Atlantic Store" was erected by the lessee, defendant E. F. Smith, prior to the negotiations with Jim Dandy Markets, Inc., and its predecessors in interest. [R. pp. 285, 231 and 228.]

On the issues thus joined the Honorable District Court, at the conclusion of the trial found, among other things, that at no time subsequent to said June 27, 1946, did the said E. F. Smith have any interest in said building other than a lien for the payment of the balance of the purchase price thereof, and at the time of the fire on January 14,

1947, the defendant E. F. Smith was not the owner of said building, and had, on said January 27, 1946, changed his interest, title and possession in and to said building. [Finding XVI, R. p. 122.]

The Court found further that the written agreement entered into between the defendant E. F. Smith and the predecessors in interest of the defendant Jim Dandy Markets, Inc., constituted the entire agreements between said parties, and that said agreements correctly expressed the intention of the parties thereto, and that there was no mistake, either mutual or otherwise, in the drafting of said agreements, including said assignment which intended to and were effective in conveying from the defendant E. F. Smith to the predecessors in interest of the defendant Jim Dandy Markets, Inc., all the right, title and interest to said building known as 6801 Atlantic Boulevard, Bell, California, subject only to the right of said defendant E. F. Smith to receive payment as in said agreements provided. [Finding XVII, R. p. 123.]

In accordance with the Findings and Conclusions of law based thereon, judgment was accordingly entered, adjudging that the defendant Jim Dandy Markets, Inc., have and recover from the plaintiff Central Manufacturers' Mutual Insurance Company, a Corporation, the sum of $12,500.00 with interest thereon at the rate of seven per cent (7%) per annum from the 9th day of May, 1947, until paid, and its costs therein.

That the defendant Jim Dandy Markets, Inc., have and recover from the plaintiff Indiana Lumbermens' Mutual Insurance Company, a Corporation, the sum of $12,500.00, with interest thereon at the rate of seven per cent (7%) per annum from the 9th day of May, 1947, until paid, and its costs therein.

That any loss to the defendant Jim Dandy Markets, Inc., by reason of the destruction of said building by fire is not apportionable between the plaintiffs and the defendant Fireman's Fund Insurance Company under the policy of insurance between Fireman's Fund Insurance Company and the defendant, E. F. Smith.

That there was no showing of mutual mistake or any mistake in the execution of said assignment.

That defendant, Jim Dandy Markets, Inc., is not entitled to the proceeds, if any, of the insurance policy issued to the defendant E. F. Smith by the defendant Fireman's Fund Insurance Company and that the defendant Fireman's Fund Insurance Company was entitled to go hence and have and recover of plaintiffs its costs and disbursements herein. [R. p. 128.]

Specifications of Error.

Appellants respectfully submit that the Honorable District Court erred:

1. In finding that the defendant E. F. Smith did not have any interest in said building other than a lien for the payment of the balance of the purchase price thereof, and at the time of the fire on January 14, 1947, was not the owner of said building. [R. p. 122.]

2. In adjudging that the defendant Jim Dandy Markets, Inc., was not entitled to the proceeds of the insurance policy issued to the defendant E. F. Smith by the defendant Fireman's Fund Insurance Company. [R. p. 130.]

3. In adjudging that the loss to the defendant Jim Dandy Markets, Inc., by reason of the destruction of said building is not apportionable between the plaintiffs and defendant Fireman's Fund Insurance Company and defendant E. F. Smith. [R. p. 130.]

4. In adjudging that the defendant Jim Dandy Markets, Inc., was the sole and unconditional owner of the building known as the "Atlantic Store" in contemplation of the terms and conditions of the policies executed and delivered by the plaintiffs herein. [R. p. 129.]

Summary of Argument.

POINT I: The defendant E. F. Smith had an insurable interest in the property covered by the plaintiffs' policies of insurance, and the policy issued by defendant Fireman's Fund Insurance Company.

POINT II: The Jim Dandy Markets, Inc., as vendee, upon completion of its agreement with defendant E. F. Smith was entitled to the benefit of the Fireman's Fund Insurance Company's insurance collectible by E. F. Smith on his insurable interest in the property.

POINT III: By subrogation and on principles of equity plaintiffs were entitled to have the insurance collectible by the defendant E. F. Smith applied on the purchase price upon the completion of the sale subsequent to the fire.

ARGUMENT.

POINT I.

The Defendant, E. F. Smith, Had an Insurable Interest in the Property Covered by the Plaintiffs' Policies of Insurance.

An insurable interest is defined in Section 281 of the California Insurance Code as follows:

> "Every interest in property, or any relation thereto, or liability in respect thereof, of such a nature that a contemplated peril might directly damnify the insured, is an insurable interest."

The various documents by which the defendant, Jim Dandy Markets, Inc., acquired the interest of defendant, E. F. Smith, in the "Atlantic Store" are enumerated in paragraph 11 of the Court's Findings of Fact. [R. p. 119.]

These were delivered by the Morrison Escrow Company to the defendant, Jim Dandy Markets, Inc., on or about July 30, 1947 [R. p. 119], although the fire occurred on January 14, 1947.

These documents consisted of:

(a) Lease dated September 29, 1941, between E. F. Smith as Lessee and Charles E. Kindig and Daisy Kindig as Lessors;

(b) Lease dated February 1, 1942, between E. F. Smith as Lessee and Thomas A. McLenaghan, as Administrator of the Estate of E. T. Williams;

(c) Bill of Sale dated June 27, 1946, executed by E. F. Smith in favor of Jim Dandy Markets, a partnership;

(d) Assignment of Lease dated June 27, 1946, which assignment was set out at length in Finding X of the Honorable Trial Court. [R. p. 116.]

Although it is seen that this assignment was not delivered until the 30th day of July, 1947, the Honorable Trial Court found in Finding XVI [R. p. 122] that

> "at no time subsequent to said June 27, 1946 (the date of the assignment) did the said E. F. Smith have any interest in said building, and had, on said January 27, 1946, changed his interest, title and possession in and to said building."

It is the contention of the appellants that the liability which defendant E. F. Smith incurred as lessee under the original leases, and the liability which he continued under as surety subsequent to the execution of the assignment was sufficient to give him an insurable interest in the property covered by plaintiffs' insurance policies and the policy executed by Fireman's Fund Insurance Company in favor of defendant E. F. Smith.

Samuels v. Ottinger, 169 Cal. 209 at page 212:

> "The effect of the assignment is to make the lessee a surety to the lessor for the assignee, who, as between himself and the lessor, is the principal bound, whilst he is assignee, to pay the rent and perform the covenants."

Thus, the privity of contract between the lessors and defendant E. F. Smith was not terminated by the assignment executed by the latter, but continued until the end

of the term, unless terminated in some legal manner, and the fact that the lessors may consent to the assignment and accept the assignees as tenants is immaterial as is also the lessors' acceptance of rent from the assignees.

Samuels v. Ottinger, 169 Cal. 209;
Wellman v. Conroy, 50 Cal. App. 141;
Jordon v. Scott, 38 Cal. App. 739.

If it be assumed as the Honorable Trial Court found [R. p. 122] that

> "at no time subsequent to said June 27, 1946, did said E. F. Smith have any interest in said building other than a lien for the payment of the balance of the purchase price thereof * * *,"

then the equitable interest therein retained by defendant E. F. Smith was sufficient to give him an insurable interest in the property.

McCollough v. Home Ins. Co., 155 Cal. 659:

While in the case just cited the equitable interest was found to be in the purchaser, the principle of law is equally applicable to a vendor as was recognized in the case of *Fageol T. & Co. v. Pac. Ind. Co.,* 18 Cal. 2d 731, holding that a vendor under a conditional sales contract has an insurable interest in the chattel sold by such contract.

To the same effect *Kleiber Motor Truck Co. v. Internatl. Ind. Co.,* 106 Cal. App. 708.

POINTS II and III.

The Jim Dandy Markets, Inc., Upon Completion of Its Agreement With Defendant E. F. Smith Was Entitled to the Benefit of the Insurance Collectible by the Latter on His Insurable Interest in the Property Obtained by Jim Dandy Markets, Inc.

This appears to follow from the principle of law that a vendor who collects fire insurance on the property between the time of effecting a contract of sale and delivery of a deed, acts as trustee for the vendee, and upon the payment of the purchase price is entitled to the insurance money in equity.

Couch on "Insurance," Sec. 1979, states:

> "Although the vendee has been held to have no right of action against the insurance company, if property is destroyed between the time of effecting the contract for the sale and the delivery of the deed, the proceeds of an insurance policy upon such property belong to the vendor, as between him and the company, but the former is held to act as trustee for the vendee, and must, therefore, account to his *cestui que* trust in equity. In other words, where insured property is destroyed after the making of the contract of sale, but before the payment of the purchase money and the execution of the conveyance, the proceeds of the insurance belong to the vendor, as between him and the company; but he acts as trustee for the vendee, who, upon payment of the purchase price, is entitled to the insurance money in equity, although he intended to tear the buildings down."

In *Brakhage v. Tracy,* 13 S. D. 343, it was held in a case when insurance was obtained appellant held the policy

for the benefit of himself to the extent of his interest in the land, and payment of the price agreed upon according to the terms of the contract is all he can rightfully demand. Confessedly, he entered into a valid contract to sell and convey the real estate described in the complaint for the consideration which respondent, without any default, stands ready to pay, less the amount received by him from the insurance company in settlement of a loss which she alone has sustained. It was held, therefore, that the purchaser was entitled upon a tender of the unpaid purchase money, less the amount of insurance money collected by the vendor, to receive a deed to the property.

In *Kaufman v. All Persons,* 16 Cal. App. 388, where the buildings were burned while in the possession of the purchaser, but before she had completed her payments, it was held the vendor was not entitled to use the insurance money for the purpose of clandestinely satisfying the unpaid balance of the mortgage and acquiring from the mortgagee a reconveyance of the property so as to prevent the purchaser from completing her payments to and receiving the vendor's deed from the escrow agent. In other words, the purchaser was entitled to have the insurance applied for her benefit upon the obligation which she was to assume in the purchase.

In *Brady v. Welsh* (204 N. W. 235), it was held that a vendor who receives insurance money paid to him in settlement of the loss of a building by fire upon premises sold by him under an executory contract to convey, after full payment of the purchase price, holds and retains the sum as trustee for the vendee.

In a note in 40 *A. L. R.* 603, following the last case, it is stated that in accordance with the rule laid down,

where the loss would, in the absence of insurance, fall upon the purchaser, the latter, may, if ready, able, and willing to complete his contract, require the insurance money to be used towards the reduction of the unpaid purchase money, although the contract was silent as to insurance.

With reference to the decision of the Honorable District Court that the loss by reason of the destruction of said building by fire is not apportionable between the plaintiffs and the defendant Fireman's Fund Insurance Company [R. p. 130], counsel for appellants Central Manufacturers' Mutual Insurance Company and Indiana Lumbermen's Mutual Insurance Company do not contend that the loss should be apportioned by virtue of the pro rata clauses of the respective policies. This clause provided:

> "This Company shall not be liable under this policy for a greater proportion of any loss on the described property, or for loss by, or expenses of, removal from the premises endangered by fire, than the amount hereby insured bears to the entire insurance covering such property, whether valid or not, or by solvent or insolvent insurers." [R. pp. 7 and 314.]

As the Honorable District Court properly pointed out in the Decision and Order [R. p. 102], where two insurance companies fully insure the same risk and one company pays the total loss, that company may force contribution from the other, but where both policies contain a pro rata or coinsurer clause, neither company may recover or claim contribution from the other, and neither can recover from the other any amount that it may have paid in excess of its pro rata share of the insurance. Such was the hold-

ing in *The Fidelity & Casualty Company of New York v. Fireman's Fund Indemnity Company,* 38 Cal. App. 2d page 1.

Nor could contribution be claimed unless the policies cover the same interest, as decided in the case of *Newark Fire Ins. Co. v. Turk,* 6 F. 2d 533.

It is obvious, of course, that the insurance provided by the plaintiffs covered the interest of defendant Jim Dandy Markets, Inc., while the insurance issued by the defendant, Fireman's Fund Insurance Company, covered the interest of defendant E. F. Smith as vendor, and the interest which, as has been seen, he retained under the incompleted escrow instructions and the assignment of the leases.

Counsel for appellants do contend, however, that as purchaser under a valid contract of purchase of premises subsequently destroyed by fire, the defendant Jim Dandy Markets, Inc., was entitled to the benefit of the insurance collectible by defendant E. F. Smith from the defendant Fireman's Fund Insurance Company. That said E. F. Smith under the weight of authority, clearly had an insurable interest in said premises and that the Honorable Trial Court should have so found and decided in construing plaintiffs' liability as prayed for in the action for declaratory relief, and should have determined that the plaintiffs were entitled to have their loss reduced to that extent by subrogation to the rights of defendant Jim Dandy Markets, Inc., and that such result depends upon recognized principles of equity and not the application of the pro rata clause of the several policies.

As said by the Court in *Millville Aerie v. Weatherby,* 82 N. J. Eq. 455, 88 Atl. 847:

> "As purchaser under a valid contract of purchase, vendee became the equitable owner of the property, in equity the property is regarded as belonging to him; the vendor retaining the legal title simply as trustee and as security for the unpaid purchase money. By reason of this equitable relation of the parties to a contract of sale of land, it has been determined by the great weight of American authority that money accruing on a policy of insurance, where the loss has occurred subsequent to the execution of the contract, will in equity, inure to the benefit of the vendee; the vendor still retaining his character as trustee, and the insurance money in his hands representing the property that has been destroyed."

To the same effect *Brady v. Welsh, decided in the Iowa Supreme Court on June 25, 1925,* 204 N. W. 235, in which the authorities are reviewed at considerable length, the Court said:

> "There can be no question under all of the authorities but that both the vendor and vendee in a contract of sale, by the terms of which the equitable title passes to the vendee, have an insurable interest in the property. Depreciation in the value thereof, whether by reason of fire which consumes the buildings or by other causes, must be borne by the vendee; likewise any appreciation in value of the property belongs to him. The only loss suffered by appellee herein was such depreciation in his security as resulted from the destruction of the building by fire. He has been paid the full purchase price of the farm, and, if permitted to retain the money received by him as

> insurance, he will profit to that extent. The rule that the vendor who receives insurance money paid to him in settlement of the loss of a building by fire, upon premises sold by him under an executory contract to convey after full payment of the purchase price, holds and retains the same as trustee for the vendee, is a wholesome one, and tends to effect justice between the parties."

In *Godfrey v. Alcorn,* 215 Ky. 465 (284 S. W. 1094), a vendor, having insured in her name a house in the possession of a purchaser, and the house having been destroyed before the purchaser paid all of the purchase price, it was held that payment of the insurance to the vendor inured to the benefit of the purchaser and extinguished his liability upon the unpaid balance of that amount on the purchase-money note.

The cases cited above have recognized that authorities are not unanimous in their conclusion as to the respective rights of the vendor and the vendee in insurance obtained by the vendor.

The California Supreme Court in the case of *White v. Gilman,* 138 Cal. 375, decided that the plaintiff vendee had no interest in the insurance money paid to the defendant and could not require that any part of it could be applied to the satisfaction of defendant's claim of the unpaid purchase money. It would appear that the balance owed on the purchase agreement was less than the amount received by the defendant from the insurance company, but the California Supreme Court reversed an order denying a motion for a new trial, granted the same

in an action brought by the plaintiff to complete the conveyance of the real estate by the vendor defendant.

This case, however, seems contrary to the holding in *Kaufman v. All Persons, etc.,* 16 Cal. App. 388, tried in the Third Appellate District, June 13, 1911. In this case an agreement to sell land provided for an option to purchase, and that the sum paid thereon was to be credited on purchase money, and that upon payment of the amount due from the vendor to a national bank, at which a deed in escrow was placed, it should be delivered to plaintiff and that the residue of the purchase price was to be paid in monthly installments, under a deed of trust from the vendor to a savings and loan society, until the debt thereto should be fully paid. It appeared that the vendor was required by the savings and loan society to have the improvements insured for its benefit, and to make any loss payable thereto, and the purchaser had been expressly required to assume the whole indebtedness payable thereto, and the property having been expressly bought subject to the deed of trust to that society, the purchaser was entitled, in case of loss by fire, to have the proceeds of the policy credited on the payments assumed by her.

The Court said at page 397:

> "We know of no just principle by which appellants can sustain their contention that the money due from and paid by the insurance company upon the policy underwritten on the building on the premises involved in this controversy should inure wholly to their benefit and not to that of plaintiff. Said building, it

will be recalled, was destroyed by fire after the plaintiff and defendants had entered into the contract of option, and subsequently to the execution and delivery to the Crocker-Woolworth Bank of the deed in escrow. The argument advanced in support of this proposition is that the policy not having been transferred or assigned to the plaintiff, the money due thereunder, upon the destruction of the building, cannot be claimed by her, but was the property of the defendants. In order to vest her with any interest in or right to said money, or to have it credited for her benefit on the note held by the savings society, so the argument goes, the policy must necessarily have previously been assigned to her by the defendant.
* * *

"By the agreement of sale, plaintiff acquired an equitable title to the property and with such title she necessarily acquired an equitable interest in the insurance policy—that is to say, the policy having been assigned or made payable to the savings society as security for the obligation which she had agreed to assume and extinguish, she, upon purchasing the property, thus acquired the right to have the money derived from said policy, in case of the destruction by fire of the building upon which it was underwritten, applied, for her benefit, upon the obligation so assumed. The rule as thus stated is expressly recognized by the very case cited by appellants (*Gilbert v. Port,* 28 Ohio St. 296, *et seq.*), wherein the following statement of the rule by Sugden on Vendors, eighth American edition, 291, chapter 7, section 2, is

approved: 'A vendee, being the equitable owner of the estate from the time of the contract of sale, must pay the consideration for it, although the estate itself be destroyed between the agreement and the conveyance; and, on the other hand, he will be entitled to any benefit which may accrue to the estate in the interim, although this was not always the rule. But now, if after the contract, and before the conveyance, the houses were burned down, the loss will fall upon the purchaser, although the houses were insured at the time of the agreement for sale, and the vendor permitted the insurance to expire without giving the notice to the vendee.' And the Ohio court, in the case mentioned, concludes, from all the authorities and upon principle, that 'the vendee, because he is the equitable owner, and, as such, is compelled to sustain the loss, occurring *after* the *sale* and *before* the *conveyance,* is entitled to any benefit that may accrue to the estate.' "

The judgment in favor of the plaintiff and the order denying defendants a new trial was affirmed.

In the companion case *Young v. Kaufman,* 172 Cal. 546, decided in the Supreme Court on May 15, 1916, the Supreme Court affirmed a judgment in favor of the defendant, and denied a motion for a new trial in an action in which the same vendor sued to recover a balance alleged to be due on the purchase price of the land, but did so apparently on the ground that the previous decision in *Kaufman v. All Persons,* 16 Cal. App. 388, was *res adjudicata.*

Conclusion.

For the foregoing reasons and on the authorities cited, counsel for appellants believe that the unquestioned weight of authority is that defendant E. F. Smith did have an insurable interest in the "Atlantic Boulevard Market"; that the defendant Jim Dandy Markets, Inc., as vendee was entitled to the benefit of the vendor's insurance, thus reducing the amount to be paid by him on the purchase contract, in effect reducing the loss which the appellants Central Manufacturers' Mutual Insurance Company and Indiana Lumbermen's Mutual Insurance Company should be called upon to pay under the coverage afforded by their policies, and that the judgment below should be amended accordingly.

Respectfully submitted,

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